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In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., ET AL.,

Appellants,

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, ET AL.,

Appellees.

On Appeal from the Supreme Court of Michigan

Brief for California Tomato Growers Association, Apricot Producers of California, Olive Growers Council of California, Raisin Bargaining Association and Prune Bargaining Association as Amici Curiae Supporting Appellees

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QUESTION PRESENTED

Whether certain provisions of Michigan's Agricultural Marketing and Bargaining Act are preempted by the federal Agricultural Fair Practices Act of 1967.

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Amici submits this brief in support of the Appellees Agricultural Marketing and Bargaining Board, et al. Consent to file this brief has been obtained from counsel for all parties and has been filed with the Clerk of this Court.

THE INTEREST OF THE AMICI.

The amici are agricultural bargaining cooperatives organized as nonprofit corporations under the laws of the State of California. Each acts as the exclusive bargaining representative or agent of its members. There are two types of exclusive bargaining agent arrangements. In one type, such as the California Tomato Growers Association, the Olive Growers Council and the Prune Bargaining Association, the membership agreement provides that the association is the exclusive bargaining or selling agent for the member and, as such, it has exclusive authority to establish and approve the minimum terms and conditions of sale for the product. Each member agrees not to otherwise sell or contract for the sale of his product except under such minimum terms and conditions as are fixed by the association. Here then, the association fixes the minimum price and terms of sale and the member contracts directly with the buyer.[1]

The Apricot Producers of California and the Raisin Bargaining Association represent another type of agricultural bargaining cooperative. Here the cooperative actually acts as the exclusive sales agent for its members with the authority to determine the price and terms of sale for, and to convey title to, the member's produce.[2] The member does not contract

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1 Section 3(i) of the membership agreement for the Olive Growers Council provides, in part, as follows:

> [t]he Council shall be, and is hereby designated, as sole and exclusive sales agent for such member with respect to his olives for processing. As such exclusive sales agent, Council shall have the exclusive authority and power during the term of this Agreement, without taking title to the olives, to establish and fix (including the authority to change and amend) and to approve the minimum terms and conditions of sale or of the contract of sale of all olives produced by or for member....

2 Section 2 of the membership agreement of the Apricot Producers provides, in part, as follows:

> [t]he Association is hereby authorized to and Association shall determine in its sole discretion as to the sale of signed apricots for processing and the Association is empowered *to sell* such apricots in the green, processed or dried state to such canners, freezers, firms, persons, corporations, and at such prices as the Association shall determine.... (emphasis added).

The Articles of Incorporation, Bylaws and membership agreement of the Olive Growers Council and the Apricot Producers of California are on file with the Exempt Organization Section, Internal Revenue Service, Department of the Treasury, Washington, D.C.

directly with the buyers for the sale of the produce.

In most cases the members agree that they will pay liquidated damages in the event that they violate the terms and conditions of their membership agreement.

Each of the amici is the collective bargaining representative of its grower members on a statewide basis.

Some products, such as tomatoes, are grown outside the State of California as well as within the State. However, the association represents only California growers. In many instances the products represented by bargaining cooperative associations are grown exclusively in California as is the case with apricots, cling peaches, olives and raisins. Some farm products are grown exclusively within the boundaries of other states such as hazelnuts, which are grown exclusively in the State of Oregon.

Bargaining cooperatives are a relatively new phenomenon and have developed as a result of the unequal bargaining power of the farm producer with the buyer in the marketplace. As the authors of one authoritative study concluded, "Cooperative bargaining in agriculture reflects, in large part, the structure of American agriculture... [with] a great many producers, each producing an insignificant part of the total output...."[3] Individual farmers therefore tend to accept the price offered to them when, as is commonly the case, it is offered by processors or other buyers, a small number of whom are dominant factors in the marketplace.[4]

Bargaining cooperatives early experienced difficulties in obtaining and retaining members because of opposition from processors. One commentator, who has had extensive experience as the manager of a large agricultural bargaining cooperative and as a consultant in agricultural marketing, summarized these as follows:

> Prior to the 1967 passage of S-109, the Agricultural Fair Practices Act, the efforts of many farm groups to bargain collectively were met with opposition from handlers and processors. The tactics on the part of some

3 P. Helmberger & S. Hoos, *Cooperative Bargaining in Agriculture* 1 (University of California 1965).

4 *Id.* at 6.

major buyers had more in common with the early history of unionization in the United States than in marketing farm products. For example, the Federal Trade Commission found that three major tomato-canning companies in Ohio engaged in a common boycott of the members of Cannery Growers Inc., a grower's cooperative bargaining association. Canners refused to contract with members of the association and offered 'sweetheart deals' to members who withdrew from the association. In one instance, field buyers contracted with growers provided the growers signed a form letter of resignation to withdraw from the association. One company, according to the testimony of a field buyer, proposed spending up to $100,000 to discourage the efforts of farmers to organize for bargaining purposes.

Growers in Pennsylvania and New Jersey who were identified with the bargaining associations found that their contracts were not renewed, or that they were discriminated against at the receiving docks of the canneries. Blacklisting of growers was also carried out in the broiler industry. In one area of Mississippi, organizers had to visit growers in the night, and not give receipts of dues payment. When growers attended meetings, their car license numbers were taken down by field staff and the growers were called on the next day and warned not to join the association. Growers in other states found their contracts terminated if they joined a bargaining association.

R. Bunje, *Cooperative Farm Bargaining and Price Negotiations* 13 (U.S. Dep't. of Agriculture, Cooperative Information Report No. 26, 1980)

His conclusions are consistent with evidence presented to Congress during the hearings on the bill, including the report of the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry in recommending its passage. *See Report of the Secretary of Agriculture to the Senate Comm. on Agriculture and Forestry*, S. Rep. 474, *reprinted in* 1968 U.S. Code Cong. Ad. News 1867, 1874.

The Federal Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301-2306 (1973) (the "Federal Act"), was a result of efforts by farm producers to improve the legal climate in which their bargaining cooperatives could function. The Federal Act was patterned upon an act adopted by California in 1967 which proscribed certain conduct as unfair agricultural trade practices. *See* California Cooperative Bargaining Association Act, Cal. Agric. Code §§ 54401-54462 (as amended 1974 and 1983). The moving forces behind the legislation were the farmers and farm organizations; the only evidence of need for the legislation presented before Congress was evidence of various forms of discrimination engaged in by buyers against producers who sought to join or remain as members of bargaining cooperatives. *See* S. Rep. 474, *supra*, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871.

Recognizing the narrow scope and inadequate enforcement machinery of the existing state and federal acts, the State of California recently enacted amendments to its Act. Assembly Bill 1944,[5] which will become effective January 1, 1984, requires accredited bargaining associations and handlers to bargain with one another in what amounts in substance to good faith.[6]

The Appellants seek to persuade this Court to hold the Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws. §§290.701-.726 (Supp. 1982) (the "Michigan Act"), unconstitutional on the rationale that it is in irreconcilable conflict with the Federal Act, because the latter not only establishes the right of producers to form and join cooperative bargaining associations free from discrimination, but also "protects an individual farmer's right not to join a cooperative

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5 Act of September 27, 1983, ch. 1100, 1983 Cal. Legis. Serv. 6010 (West) (amendments to be codified at Cal. Agric. Code §§54401-54463).

6 When the amendment becomes effective, §54431 of the Food and Agricultural Code will provide that it is an unfair trade practice for a coopertive bargaining association or a processor to "refuse to negotiate or bargain at reasonable times and for reasonable periods of time with a genuine desire to reach agreement and a serious attempt to resolve differences . . . for price, terms or sale, compensation for commodities produced under contract, and other contract provisions . . . . " Act of September 27, 1983, ch. 1100, §9, 1983 Cal. Legis. Serv. 6010, 6014 (West).

association and prohibits interference with that right by processors and cooperative associations... [and] protects the right of purchasers of farm commodities to deal freely with the customers of their choice."
(Appellants Brief on the Merits 14) [hereinafter (App. Br.)]. Appellants contend the Michigan Act violates what they consider to be such protected rights.

If this Court embraces the three-policy interpretation of Appellants, the result could seriously impair the rights of states to enact legislation, such as that enacted in California, which may be desirable or necessary to effectuate the purposes of the Federal Act. Amici respectfully submit that the Michigan Supreme Court correctly recognized that the purpose of the Federal Act was to guarantee to agricultural producers the freedom to join cooperative bargaining associations in order to enhance their bargaining power, and that Congress did not intend to prohibit states from enacting legislation to implement that guarantee. Amici urge this Court to adopt the Michigan Supreme Court's reasoned analysis and uphold the Michigan statutory scheme as being consistent with the Federal Act.

ARGUMENT

I. THE MICHIGAN ACT IS NOT IN CONFLICT WITH AND THEREFORE IS NOT PREEMPTED BY THE FEDERAL ACT.

A. Congress Did Not Intend to Preclude the Right of States to Enact Legislation to Implement the Purposes and Rights Established by the Federal Act.

Appellants concede that in enacting the Federal Act, congress did not intend to preempt the entire field from state regulation.[7] The question, then, is whether the Michigan Act

7 The House Committee Report accompanying H.R. 13541 evidenced Congress' intent that "no state law should be *superceded* or *preempted* by this legislation which is *supplementary* to and not in replacement of all other existing legal reme-

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982). (App. Br. 11-12).

The Amicus American Frozen Foods Institute cites the Congressional declaration in Section 2301[8] that agricultural marketing and bargaining activities "directly burden or affect interstate commerce" as evidence of Congress' intent to fully exercise its authority under the Commerce Clause to the "maximum constitutionally permitted." (Amicus Brief of the American Frozen Foods Institute on the Merits 14). On this basis, the Amicus contends that the Michigan Supreme Court misconstrued Section 2305(d),[9] the "existing State Law" provision and ignored Section 2301 in determining that the Michigan Act "was a step by the Michigan legislature into a previously unregulated area". 416 Mich. at _____, 332 N.W.2d at 141.

We disagree. The Michigan Supreme Court's construction of the Federal Act recognizes that the federal government is a government of enumerated powers and that those powers not specifically granted to the federal government are reserved to the states. U.S. Const., amend. X. Under the Constitution, Congress is only empowered to regulate activities affecting interstate and foreign commerce. U.S. Const., art. I, §8, cl. 3. Therefore, Congress must assert its jurisdictional basis when invoking its Commerce Clause power to enact legislation.

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dies." H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967) (emphasis added). Among the available legal remedies in existence at that time were those provided for under then existing state fair practice acts. *See, e.g.*, Cal. Agric. Code §54461 (criminal penalty), §54462 (civil penalty), §54405 (injunctive relief) (enacted in 1967, *see* Act of March 15, 1967, ch. 15, 1967 Cal. Stats. 44, 610).

8 7 U.S.C. §2301 provides, in part:

> Agricultural products are produced in the United States by many individual farmers and ranchers scattered througnout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce.

9 7 U.S.C. §2305(d) provides, in part:

> The provisions of this chapter shall not be construed to change or modify existing State law or deprive the proper State courts of jurisdiction.

It has long been clear that Congress has the power under the Commerce Clause to reach intrastate agricultural marketing activities which affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). However, the jurisdictional statement by Congress of its power to *reach* activities under the Commerce Clause clearly is not evidence of its intent to regulate fully *every aspect* of those activities. If we follow this argument of the Amicus to its logical conclusion, then every activity which Congress could reach under the Commerce Clause power would, by the mere exercise of that power, be preempted from state regulation. This would clearly be inconsistent with the Federal-State balance embodied in the Constitution.

Moreover, the Michigan Supreme Court's construction of the Federal Act is consistent with this court's determination that absent a *clear statement* of congressional purpose, federal legislation "will not be deemed to have significantly changed the Federal-State balance."[10] *Heublein v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-82 (1972); *United States v. Bass*, 404 U.S. 336, 349 (1971). The Federal Act does not contain a clear statement of Congressional purpose which would be necessary to change that balance and to preclude action such as that taken by Michigan.

Appellants contend that although the Federal and Michigan Acts share the common goal of protecting the producers right to join a cooperative association, they have established regu-

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10 Professor Tribe notes the compelling reasons for requiring a *clear statement* of Congressional purpose.

> The rule . . . is an important complement to the political check on congressional exercise of the commerce power. Legislative coalitions need not rest on definitive compromises of conflicting interests if the legislation a coalition secures is sufficiently ambiguous. For in that case, competing interests retain a full opportunity to press their claims anew to the courts that are called upon to interpret the law. Such an outcome is unsatisfactory in the commerce clause context, however, since contemporary doctrine provides courts with no trenchant criteria for striking the balance that Congress managed to avoid. A rule like the clear statement requirement is therefore essential: Congress must be prevented from resorting to ambiguity as a cloak for its failure to accommodate the competing interests bearing on the Federal-State balance.

L. Tribe, *American Constitutional Law* §5-8 at 243-44 (1978).

latory schemes that irreconcilably conflict. (App. Br. 13). Appellants contend that the Federal Act evidences three distinct objectives, namely protection of a farmer's right to join a cooperative association, preservation of a competitive market system in which processors are free to bargain with farmers of their choice, and protection of independent farmers against compulsory cooperative membership. (App. Br. 14). The Appellants conclude that the Federal Act "created a competitive system in which associations, independent farmers, and processors would all be free from compulsion or coercion." (App. Br. 17).

Appellants rely upon Section 2304 as authority for the proposition that the Federal Act protects the rights of buyers to bargain directly with an individual producer and that state law interfering with that right is preempted.

Section 2304 of the Federal Act provides:

> *Disclaimer of intention to prohibit normal dealing.* Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

7 U.S.C. §2304 (1973).

Appellants suggest that by indicating in Section 2304 what buyer activities were neither prevented nor required by the Federal Act, Congress evidenced its national policy of favoring the competitive free market system, thus precluding state regulation impinging on what they describe as the free market right. (App. Br. 17, 33-35, 37). However, the very nature of any economic regulation is an encroachment on the free market system. In fact, in proscribing certain conduct by handlers in their relationship to producers, the Federal Act substantially modifies the free market system.

Nonetheless, state economic regulation affecting the free market system is allowed in many areas also subject to federal legislation. In the antitrust area, for instance, this Court has held that the national policy favoring free competition in busi-

ness is an insufficient basis from which to infer a Congressional intent to preempt states' statutes having an adverse effect on competition. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132-33 (1978). "[F]or if an adverse affect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." 437 U.S. at 133.

It is clear from the Federal Act's statutory scheme that Congress recognized that only the right to join and bargain collectively through a cooperative would provide producers with any meaningful economic bargaining power. It hardly follows, as Appellants argue, that Section 2304 evidences Congress' intent to *preclude* state action to effectuate and implement the producers federally-created right to join and bargain through cooperatives. As the Michigan Supreme Court noted, Section 2304 is "simply a statement indicating that the [Federal Act] did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity." 416 Mich. at _____, 332 N.W.2d at 139.

Similarly, for reasons discussed more fully below, (see Section I. C. 2 .), Section 2303 does not evidence a clear statement of federal purpose from which an intent to preempt may be inferred. In Section 2303, Congress manifested only its prohibition of *wrongful* conduct. It cannot fairly be inferred from this that Congress intended to preempt state statutes which require an individual producer to join or be subject to the terms of an association of producers when necessary to protect the rights of all producers.

In promulgating the Federal Act, Congress in effect recognized that agricultural marketing and bargaining is traditionally an area of state concern. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963). The method of agricultural bargaining is largely dependent upon the nature of the crop or crops produced.[11] In some states a crop is pro-

11 *See* R. Bunje, *Cooperative Farm Bargaining and Price Negotiations* 45-52 (U.S. Dep't. of Agriculture, Cooperative Information Report No. 26, 1980); P. Helmberger & S. Hoos, *Cooperative Bargaining in Agriculture*, *supra* note 3, 11, 39-43.

duced exclusively within its boundaries, and state legislation tailored to meet special concerns may be appropriate. In fact, since enactment of the Federal Act, many states have adopted fair practice legislation to implement the rights established by the Federal Act.[12] The Michigan Act is but one example of a valid state statue regulating agricultural bargaining.

B. The Purpose of the Federal Act was to Protect the Rights of Producers to Join and Bargain Collectively Through Cooperatives.

The purpose of the Federal Act was to enhance the bargaining power of farmers by establishing their right to join and bargain collectively for the sale of their produce through bargaining cooperative associations without fear of reprisal or discriminatory conduct toward them by buyers for exercising that right.

This purpose is manifest in the statement of Congressional findings:

> The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and the general economy of the Nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together volunarily in cooperative organizations, as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

7. U.S.C. 2301 (1973).

It is evident from the genesis and history of the Federal Act that the aim of Congress was elimination of the discriminatory behavior on the part of processors. Indeed, the *only evidence*

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12 *See, e.g.*, Indiana Agricultural Cooperative Act, Inc. Code Ann. §§15-7-1-1-33 (Burns 1973); Maine Agricultural Marketing and Bargaining Act, Me. Rev. Stat. Ann. Tit. 13, §§1953-1965 (1973); Minnesota Agricultural Marketing and Bargaining Act, Min. Stat. Ann. §§17891-.701 (West 1983); Oregon Producer's Cooperative Bargaining Associations Act, O.R. Rev. Stat. §§646.515-.545 (1981).

before Congress related to the abuses and discriminatory acts of buyers against producers who sought to join and bargain through their cooperatives. *See* S. Rep. 474, *supra, reprinted in* 1968 U.S. Code Cong. & Ad. news 1867, 1871.

The Michigan Supreme Court clearly recognized this Congressional purpose in upholding the constitutionality of the Michigan Act. The history of the Federal Act provides ample proof of this legislative purpose. The report of the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry in recommending passage of the Federal Act states in part:

> It is essential to protect the rights of producers to join together in cooperatives to perform necessary marketing operations, including bargining with processors and other buyers over the terms of sale of the producers' farm products....
>
> The proposed bill would materially strengthen farmers' ability to bargain and market effectively. It will reaffirm the right of producers to join together and operate cooperatives without interference. It will remove some of the impedimets confronting producers in organizing and operating their cooperative association.
>
> Producers have suffered harrassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissention in the organization.
>
> Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such quesitonable processor actions.
>
> If this bill were enacted, many producers who fear harassment or discimination would feel free to join a cooperative association. It would help producers use

cooperatives as a more effective tool in marketing their products.

Report from the Secretary of Agriculture to the Senate Comm. on Agriculture and Forestry, S. Rep. 474, *supra, reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1875.

The Michigan Supreme Court correctly concluded that the Federal Act was not, as Appellants contend, "designed . . . to accomplish three distinct goals". (App. Br. 13). Rather the Federal Act was designed by Congress as a remedial measure. The legislative history makes clear that the purpose of the Federal Act was to correct an *imbalance*—by eliminating the impediments to the formation of cooperative associations and alleviating the disparity in economic bargaining power which existed between the individial producers and their buyers.

C. The Michigan Act Is Consistent with and Does Not Conflict with the Purpose or Provisions of the Federal Act.

1. The Federal Act Does not Create or Protect a Federal Right in Buyers to Bargain Directly With an Individual Producer.

Under the Michigan Act, an accredited association is the exclusive bargaining representative of all producers in the bargaining unit for the purpose of bargaining with buyers. Mich. Comp. Laws §290.713 (Supp. 1982). The Michigan Act makes it an unfair trade practice for a buyer to refuse to bargain with an association if the buyer has had previous, substantial dealings with the association or with the producers included in the bargaining unit; individual negotiations with producers are prohibited once the association is designated as exclusive bargaining representative. Mich. Comp. Laws §290.704(1)(g),(h)(Supp. 1982).

Appellants contend that the Michigan Act compels the buyer to bargain with cooperatives which violates the purposes of the Federal Act. (App. Br. 35). In essence, Appel-

lants argue that in Section 2304 Congress protected the right of buyers to bargain with individual producers of their choice and that the Michigan Act destroys that right.[13]

We believe that the Michigan Supreme Court correctly interpreted Section 2304 as being merely explanatory of the limits upon the Federal Act. Section 2304 neither creates nor protects substantive rights.

> We do not discern from a provision termed a "disclaimer of intention" a positive congressional intent to prohibit the conduct said not to be regulated. There is no logical nexus between a provision declaring "this is what we did not do" and the conclusion that "what we did not do, cannot therefore be done." Section 2304 is nothing more than an explanation of what [the Federal Act] was not intended to do. It did not, in disclaiming any "Intention to prohibit normal dealing," thereby create or affirmatively protect an individual handler's right to bargain with any producer, or an individual producer's right to bargain for himself. It is simply, aside from the disclaimer, neutral on *that* point. Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations. It is simply a statement indicating that [the Federal Act] did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity.

416 Mich. at ____, 332 N.W.2d at 138-39.

Appellants suggest that the language and legislative history of the Federal Act demonstrate Congress' intent to preserve the free market system, in which processors would not be

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13 In their Brief on the Merits, Appellants cast their argument in terms of the buyer's right not to be compelled to deal with an association of producers. (App. Br. 35). In their Jurisdictional Statement, they cast the argument in terms of the buyer's right to be free to bargain with individual producers of the buyer's choice, including individual producers who are members of the associations. (Appellants Jurisdictional Statement 18-22). The arguments are essentially the same, for if a buyer cannot be compelled to bargain with an association of producers, then it follows that he is free to bargain with those individual producers he desires, including association members.

forced to deal with cooperatives. (Ap. Br. 31). They characterize the language of Section 2304 as limiting *cooperative* power, by denying to cooperatives the power to compel producers to bargain with them. (*Id.*)

Appellants derive their analysis from Section 2303, which addresses only handler dealings with "producers," a term that does not include associations, *see* 7 U.S.C. §2302(b), and Section 2304, which states that nothing in the Federal Act "require[s] a handler to deal with an association of producers." 7 U.S.C. §2304. Appellant's interpretation of these sections is inconsistent with the basic purpose of the Federal Act.

A bargaining cooperative is, by definition, a cooperative through which members bargain collectively for price and terms of sale of its members produce.[14] Implicit in the right to join such a cooperative is the right to bargain through it, or the right to join is meaningless. If the Federal Act were interpreted to provide that a buyer cannot be compelled to bargain with an association and has an absolute right to bargain directly with an individual producer, even one who has appointed the association as his designated agent, then the purpose of the Federal Act would be frustrated upon formation of the cooperative.[15] Producers who join a cooperative would thus be left without any means of achieving the effective economic bargaining power the Federal Act sought to establish.[16]

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14 R. Bunje, *Cooperative Farm Bargaining and Price Negotiations*, *supra* note 11, at 1.

15 The Amicus for the National Food Processors describes the "principal thrust" of the Federal Act to be prevention of handler interference with the *formation* of cooperative associations. (Amicus Brief for National Food Processors on the Merits 24). The Amicus characterizes formation as a two step process—1) creation of the organization and 2) designation of the association as exclusive bargaining agent. It contends that only the first step in the process is protected, once the second step occurs the cooperative members lose their protected status. This analysis ignores the fact that such an association normally does not have the authority to function unless it has the requisite number of members who have signed membership agreements designating the association as their exclusive bargaining agent. See notes 1 and 2.

16 The legislative history reflects Congress' intent that such a situation not occur. "The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves *respect* and *recognition* by the handler of the agricultural products." Senate Report 474, *supra*, *reprinted* in 1968 U.S. Code Cong. & Ad. News 1867, 1873 (emphasis

What is lost in Appellants construction of the Federal Act is the fact that a cooperative is, after all, only the aggregate of its individual members, for whose protection the Federal Act was adopted. We concur with the Solicitor General's statement that, "[t]he obligation, such as it is, to deal with an association appointed by a producer as his agent arises from the voluntary act of the *producer*, coupled with prohibition of discrimination against a producer 'because of his membership in or contract with an association.' (7 U.S.C. 2303(b))." (Solicitor General's Brief on the Merits 12 n.5) [hereinafter (Sol. Gen. Br.)]. (emphasis added).

Moreover, if a buyer has a federal right to negotiate directly with an individual producer, even one who has voluntarily appointed an association as his designated agent, then Congress has mandated a system whereby a buyer is free to induce such a producer to contract with him despite the fact that in many instances such direct dealing by the producer would be in violation of his membership agreement. *See Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).[17]

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added). *See also* 114 Cong. Rec. 7464 (1968) (remarks of Rep. Sisk) ("Certainly we want to avoid the interpretation that the legislation intends to encourage circumvention of a properly constituted marketing or bargaining association.").

17 With many cooperatives, under the terms of the membership agreement, the member agrees that only the cooperative has the authority to execute a contract with the buyer for the sale of his produce. The member agrees that he will be subject to legal action by the cooperative, such as liquidated damages, if he violates that committment. *See* R. Bunje, *Cooperative Farm Bargaining and Price Negotiations*, *supra* note 11, at 45-46. Cooperatives of this type include the California Canning Peach Association, Apricot Producers of California, and Raisin Bargaining Association.

Similarly, when the association does not contract for the members, but acts as the exclusive bargaining agent with the authority to determine minimum price and terms of sale, the member agrees that he will be subject to legal action by the cooperative, and often a liquidated damage provision is included in the membership agreement. *Id.* at 46-47. Cooperatives of this type include the California Tomato Growers Association, Olive Growers Council and Prune Bargaining Association.

The ability of the bargaining cooperative to function effectively depends upon its ability to honor legal commitments which it undertakes with the buyers with which it contracts on behalf of its members. Consequently, the enforcement of the members' obligations to the cooperative is essential if the cooperative is to function effectively. Failure of members to comply with the terms of their membership agreements and to support the organization affects all members of

Simimlar Congressional legislation demonstrates that when Congress intends to balance competing interests in the creation or protection of economic rights, it does so in an affirmative manner, not by inference or implication. For example, the balance structure of the National Labor Relations Act, as amended, 29 U.S.C. §§151-168 (1973) (the "NLRA"), exemplifies a compromise struck between competing concerns. In the NRLA, Congress specified those labor activities of employees which were to be protected, 29 U.S.C. §157, and those labor activities of *both* management and labor organizations which were to be prohibited, 29 U.S.C. §158. By this statutory scheme, Congress created an affirmative declaration of rights and restrictions on all interests and struck a "balance . . . between the uncontrolled power of management and labor to further their respective interests." *Carpenters Local 1967 v. N.L.R.B.*, 357 U.S. 93, 100 (1958).[18]

The statutory scheme of the Federal Act manifests no similar comprehensive and balanced structure. Under Section 2303, Congress affirmatively protected the right of producers to join and bargain through cooperatives by prohibiting certain discriminatory acts by buyers. But, Section 2304 "protects" the rights of buyers only by negative inference. Section 2304 provides that "[n]othing in this chapter shall prevent handlers and producers from selecting their customer and suppliers . . . nor require a handler to deal with an association of producers." 7 U.S.C. §2304. Yet, to be consistent with Sec-

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the cooperative. *Id.* at 76-78. *See also* P. Helmberger & S. Hoos, *Cooperative Bargaining in Agriculture*, *supra* note 3, at 35-39.

An interpretation the Federal Act that protects a buyer's right to bargain directly with individual association members would disrupt this essential characteristic of the bargaining association and would frustrate the intended purpose of the Federal Act. Moreover, such an interpretation would also interfere with the rights of other buyers who choose to contract with the bargaining association, because those buyers would have no guarantee that the bargaining cooperative members would honor their committments to provide produce to the buyers.

18 It is true that the preemption doctrine can apply to state regulation of activities neither arguably protected nor prohibited under the NLRA— activities intentionally left unregulated on the basis of a Congressional determination that such should be left to the free-market forces. Nevertheless, the basis for such preemption is the comprehensive and balanced structure of the statutory scheme. *See Machinists v. Wisconsin Employment Relations Committee*, 427 U.S. 132, 148-51 (1976).

tion 2303, and the NLRA scheme, the language of Section 2304 should have prohibited an association of producers from "requiring a buyer to deal with it" or "inhibiting a buyer's rights to deal with individual members of the association." Obviously, this is not what Section 2304 says.[19]

It is illogical to conclude that when faced with such clearly competing interests, Congress enacted a statutory scheme which manifests a clear statement of the rights of producers to bargain collectively in Section 2303, and yet leaves to inference the rights of buyers it is also alleged to protect in Section 2304. A more logical explanation is that adopted by the Michigan Supreme Court. Section 2304 is nothing more than it purports to be—a "Disclaimer of Intention"—a statement by Congress of what it did *not* do in creating the Federal Act.

2. The Federal Act Does Not Afford a Producer an Absolute Right to Bargain Directly With a Handler but Protects Him from Being Unduly Influenced by a Handler in Deciding Whether or Not to Join a Cooperative Bargaining Association.

Appellants contend that the "Federal Act protects an individual farmer's right not to join or to bargain through a cooperative and the Michigan Act destroys this right." (App. Br. 19). Appellants suggest that the Michigan Supreme Court erroneously concluded that the Federal Act did not create or protect such a right. (App. Br. 26). We believe this contention misconstrues the holding of the Michigan Supreme Court and the purpose and language of both the Federal Act and the Michigan Act.

The Michigan Supreme Court clearly recognized that under

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19 Inasmuch as Appellants characterize Section 2304 as a statement of Congressional intent to preserve the competitive market system (App. Br. 35), it is interesting to note that Congress' statement is incomplete, at least as to the rights of individual producers. With regard to those rights, Section 2304 provides: "[n]othing in this chapter shall prevent... producers from selecting their customers.... " 7 U.S.C. §2304. This language is meaningless.

We think it curious that, after "years of congressional debate" (App. Br. 35), Congress could not create a coherent statement of rights within Section 2304, a section which Appellants contend manifests a "deliberate balancing of competing interests.... " (App. Br. 31).

the Federal Act a producer had a right to join or to refrain from joining an association of producers. *See* 416 Mich. at ___ n. 13, 332 N.W.2d 139-140 n. 13. The Michigan Supreme Court's emphasis, however, was on the fact that the primary purpose of Congress in enacting the Federal Act, and of Michigan in enacting the Michigan Act, was to protect a farmer's right to join a cooperative association and to bargain collectively through that association free from handler coercion. The Court therefore correctly concluded that while a producer has a right not to join an association, "[s]ubsection (a) [of Section 2303] does not afford an *absolute* right to a producer to deal directly with a handler." 416 Mich. at ___, 332 N.W.2d at 139. (emphasis added). The extent to which the individual producer's right to deal directly with a buyer exists under the Federal Act must be understood in the context of the entire Act and its purpose.

The Solicitor General concedes that the principal thrust of the Federal Act is to protect producers from coercion in the exercise of their right to join or remain as members of a bargaining cooperative. (Sol. Gen. Br. 6). He further concedes that Congress did not attempt to create a comprehensive statement of the bargaining rights of producers and buyers in the Federal Act. (*Id.*). *See* 114 Cong. Rec. 7453-7454 (1968) (remarks of Rep. Poage); *id.* at 7456 (remarks of Rep. May). He concludes, however, that the Federal Act intended to protect individual producers from *any sort* of compulsion by cooperative associations and that the Michigan Act "frustrates the 'purposes and objectives' of the [Federal Act]" and is therefore unconstitutional. (Sol. Gen. Br. 6). We take issue with this interpretation of the Federal Act and therefore his conclusion.

We agree that the term "handler" as used in Section 2303 includes associations of producers as well as buyers and, further, as the Michigan Supreme Court also concluded, the right of producers not to join such associations is covered by Section 2303(a).

We contend that the Solicitor General overlooks the basic premise of the Federal Act and the context in which reference

is made to the right of an individual producer to join or not to join an association. Subsection (a) is one of a series of types of conduct by handlers which is proscribed by Section 2303. Subsection (a) prohibits *coercion* of a producer in the exercise of his right to join or refrain from joining an association of producers. What is meant by "coercion" is illustrated by the nature of the other types of handler conduct which are proscribed under Section 2303; for example, subsection (b) applies to *discriminatory* acts against a producer because of his membership in or contract with an association; and in subsection (c) coercion is equated with *intimidating* a producer with respect to certain acts. The character of the prohibited acts is clear; the statute is aimed at *wrongful* conduct which compels a producer to join or refrain from joining an association.

The legislative history supports this analysis. The Senate Report notes that the prohibitions of Section 2303 are intended to prevent the exercise of "*improper* pressure" upon an individual producer in compelling him to join or not to join an association. *See* S. Rep. 474, *supra*, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871. The legislative history is replete with examples of wrongful conduct by buyers, which, as discussed above, (see Section I.B.), lead to the introduction of the Federal Act before Congress. It is important, again, to note that the legislative history relates only to wrongful conduct by processors and other buyers.

The quotation from Representative Sisk's testimony explaining why the House of Representatives deleted the phrase "association of producers" from Section 2303, cited by the Appellants and the Solicitor General, demonstrates the intent of Congress that there be no implication in the Federal Act that there had been any evidence of past wrongdoing by bargaining cooperatives. He testified that the "phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers." 114 Cong. Rec. 7464 (1968). (App. Br. 21). (Sol. Gen. Br. 9). As we observed earlier, no evidence was presented before the House or the Senate of coercion on the part of associations of producers toward producers or processors. Thus, Congress was not

concerned about misconduct by bargaining associations when the Federal Act was adopted. The reference to the right of producers not to join such associations was included only on the argument by some that it was logical to do so. *See* S. Rep. 474, *supra*, *reprinted in* 1968 Code Cong. & Ad. News 1867, 1871.

If then the Federal Act proscribes only *wrongful* conduct by handlers, and it does not purport to make a comprehensive statement of rights of producers or buyers, how, then, does the Michigan Act conflict with the Federal Act?

The Michigan Act is essentially enabling legislation pursuant to which a majority of producers in a given bargaining unit may elect to establish a bargaining association as an exclusive bargaining agent for the producers in that unit. Mich. Comp. Laws §§290.707, 290.710 (Supp. 1982). No producer is required to join the association, but the Michigan Act does require that nonmember producers be bound by the terms established by the association and must financially support the association. Mich. Comp. Laws §§290.710(1), 290.713(1) (Supp. 1982).

Insofar as a producer who does not wish to join an association is limited in his right to bargain directly with his buyers, this limitation results from the action of a majority of the producers in his bargaining unit, not from the action of the association or, for that matter, the state.[20] Two important consequences arise from this fact. First, inasmuch as the "pressure" to join the association comes from the majority of

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20 Appellants argue that states may enact laws which have effects contrary to federal law only if Congress so ordains, citing *Parker v. Brown*, 317 U.S. 341 (1943), and cases following. (App. Br. 27). Appellants further contend that "the immunity from preemption created by *Parker v. Brown* is only for true state action... [and] [i]ndividual anticompetitive action, even if authorized, approved, encouraged, or directed by the state, is not exempt." (App. Br. 28-29). *See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Michigan Act, they contend, does not fall within this limited exemption from preemption.

This argument begs the essential questions, namely whether the Michigan Act is indeed contrary to and preempted by the Federal Act. Appellants cannot bootstrap their argument by the use of circuitous reasoning. It is unnecessary to reach the issue of whether the Michigan Act falls within the *Parker v. Brown* exemption. That issue is simply not before the Court in this case.

producers and not the association, it is not action by a "handler" and therefore does not fall within the prohibitions of Section 2303(a). Second, and more important, the "pressure" which compels a producer to join an association, or be bound by its terms, is not the type of conduct which Congress envisioned would be prohibited by Section 2303. It is not *improper* pressure, of a character similar to the acts of intimidation and discrimination practiced by buyers, which resulted in passage of the Federal Act. Rather, it is *proper* pressure, necessary to protect the rights of *all* of the producers in the bargaining unit.

It is of course true that the producer who prefers not to join an association is affected by the exercise by producers of the enabling authority provided in the Michigan Act. This, however, is simply the approach adopted by one state to implement the basic purpose of the Federal Act; as pointed out, others have adopted different approaches, as is the case in California.

The crucial point is that Congress did not attempt to make a comprehensive statement of rights, it did not attempt to adopt a scheme by which its purposes could be implemented, and perhaps of most importance, in proscribing certain wrongful conduct, it did not declare what a *state* could *not* do.

CONCLUSION

The Federal Act was promulgated for the purpose of establishing and protecting the right of farm producers to bargain collectively through a bargaining association free from reprisal. Congress, in adopting the Federal Act, did not adopt a comprehensive plan for implementing and effectuating that right nor did Congress express an intention that the States would be precluded from adopting such a plan.

No Congressional intention to preempt can reasonably be inferred from the language in Section 2304, a provision which was included to clarify the limits of the Federal legislation. Nor can such Congressional intention be fairly inferred from Section 2303 which proscribes wrongful conduct, not actions of

the type authorized by the Michigan Act.

Amici respectfully submits that the Michigan Act creates no irreconcilable conflict with the Federal Act. Preemption of the Michigan Act is not warranted and the decision of the Michigan Supreme Court should be upheld.

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